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Supreme Court, U.S.
FILED

07-334 SEP 14 2007

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SUPREME COURT DOCKET NO. _____

UNITED STATES SUPREME COURT

Adam Steele, et al.,
Petitioners,

vs.

The County of Beltrami,
State of Minnesota, et al.,
Respondants.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petition for Writ of Certiorari

This Petition is filed jointly by the following Petitioners, each of whom is pro se:

1) Adam Steele, P.O. Box 1132, Bemidji, MN 56619 218-759-1162

2) Donnis Solberg, 102 Bemidji Rd., NW, Turtle River, MN 56601 218-586-2281

3) James A. Ness, 20250 Tepee Hill Lane, Hines, MN 56647 218-835-4250

4) Turtle Creek Saloon, Inc., by Justin Chrz, CEO, 273 Bemidji Rd. NE, Turtle River, MN 56601 218-586-2081

A. QUESTIONS PRESENTED FOR REVIEW

1. Does the "Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work" ("The Ordinance") address a valid public purpose?

2. Does The Ordinance, which prohibits smoking in bars, restaurants, and other privately owned indoor places, unreasonably violate Constitutional rights of privacy, and other personal rights as guaranteed by the Fourth and Ninth Amendments to the United States Constitution, and including penumbral privacy rights[1] under the Constitution ?

3. Does The Ordinance inappropriately and unreasonably restrict the ability of a bar or restaurant owner to contract for a customer's patronage and business?

4. Does The Ordinance unreasonably restrict the ability of a customer to privately contract for goods and hospitality services, including his ability to smoke during the delivery of said good?

5. Does the ordinance, by strongly diminishing the value of "goodwill" (an intangible asset, generally measured by annual gross receipts or profits, which is a material factor in the worth and selling price of a business) of a bar or restaurant, constitute a regulatory "taking", without just compensation; which is prohibited by the Fifth Amendment to the United States Constitution, and Article 1, Section 13

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[1]e.g. a "zone of privacy" as defined by Mr. Justice Douglas in *Griswold v. State of Connecticut*, 85 S. Ct 1678 (1965)

of the Minnesota Constitution? (The Minnesota Constitution is more stringent, requiring that the compensation be *first* paid or secured.)

6. Did the USDC err in refusing to allow the pro se appearance of sole-proprietor Plaintiffs Ness and Solberg, refusing to let them be heard at the hearing on Preliminary Injunction, and refusing to recognize their appearance in writing at the hearing on Defendants' Motion for Summary Judgement?

7. Did the U.S. District Court err in granting summary judgement when there were genuine issues of material fact to be determined?

B. LIST OF THE PARTIES

The following is the list of parties to the orginal proceeding in the Federal District Court of the District of Minnesota, and later before the United States Court of Appeals for the Eighth Circuit, the judgements of which Courts are sought, now, to be reviewed:

Plaintiffs:

1) ADAM STEELE, an individual;

2) DONNIS SOLBERG, an individual;

3) JAMES A. NESS, an individual;

4) TURTLE CREEK SALOON, INC., a Minnesota Corporation,
CORPORATE DISCLOSURE: There is no parent corporation of this corporation, nor any publicly-held corporation owning 10% or more of said corporation's stock; and

5) (This original Plaintiff does not join in this petition) CORNER BAR OF BEMIDJI, INC., a Minnesota Corporation,
CORPORATE DISCLOSURE: There is no parent corporation of this corporation, nor any publicly-held corporation owning 10% or more of said corporation's stock;

6) (This original Plaintiff does not join in this petition) TOBACCO SUPER STORE, INC., a Minnesota Corporation

Defendants:

1) THE COUNTY OF BELTRAMI, STATE OF MINNESOTA;

2) KEITH WINGER, Sheriff of the County of Beltrami, State of Minnesota; and

3) other unnamed persons and entities.

DISINTERESTED PARTIES:

Petitioners name the following as disinterested parties in this Petition:

Corner Bar of Bemidji, Inc. (Plaintiff 5, ante), for reason that said Plaintiff has not joined in this Petition.

Tobacco Super Store, Inc. (Plaintiff 6, ante), for reason that said Plaintiff has not joined in this Petition.

C. TABLE OF CONTENTS

A. Questions presented for review 1

B. List of parties to the proceeding 3

C. Table of contents and authorities 5

D. Citations entered in the case 6

E. Statement of basis of jurisdiction 8

F. Constitutional and statutory provisions 8

G. Statement of the case 9

H. Argument 13

APPENDIX

I. Opinion of the United States Court of Appeals entered in conjunction with the judgment sought to be reviewed 17

II. Constitutional and statutory provisions 21

III. Other relevant material

a) The subject Ordinance 25

b) Signatories to this Petition 34

TABLE OF CITED AUTHORITIES

Griswold v. State of Connecticut, 85 S. Ct. 1678 (1965) 1

D. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

1) 12/30/2004 - ORDER denying Motion for TRO . Signed by Judge Joan N Ericksen on 12/30/2004. (amg) (Entered: 12/30/2004)

2) 01/26/2005 - ORDER That the Plaintiff's Application to File Documents Conventionally, is DENIED, as moot, and the Clerk of Court is directed to file the Plaintiff's documents conventially. Signed by Magistrate Judge Raymond L Erickson on 1/26/05. (JMH) (Entered: 01/26/2005)

3) 05/25/2005 - PRETRIAL NOTICE AND ORDER Pretrial Conference set for 6/28/2005 09:15 AM In Chambers Hearing before Magistrate Judge Raymond L Erickson. Signed by Magistrate Judge Raymond L Erickson on 5/25/05. (Entered: 05/25/2005)

4) 06/27/2005 - Minute Entry for proceedings held before Judge Joan N Ericksen : Motion Hearing held on 6/27/2005 re MOTION for Summary Judgment filed by Beltrami, County of, Keith Winger. Court orders on the record that Defendants' Motion is GRANTED as to Counts 1, 2, 3, 4 and 7 and those counts are dismissed with prejudice. The remaining counts 5, 6, 8 and 9 are state claims. The Court declines to exercise supplemental jurisdiction over these four counts and they are dismissed without prejudice. No

further order will be issued. (Court Reporter Maria Weinbeck) (slf) (Entered: 06/27/2005)

5) 06/07/2007 - Opinion of USCA as to Notice of Appeal to 8th Circuit (Chief Judge Loken, Judge Gruender, Judge Benton): We affirm the decision of the District Court. (akl) (Entered: 06/08/2007)

6) 06/07/2007 - USCA JUDGMENT as to Notice of Appeal to 8th Circuit: The judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. (akl) (Entered: 06/08/2007)

7) 06/27/2007 - MANDATE of USCA as to Notice of Appeal to 8th Circuit (akl) (Entered: 06/28/2007)

E. BASIS F JURISDICTION

1) The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on June 7, 2007. No rehearing was sought by any party.

2) Jurisdiction to review, on writ of certiorari, the judgment is conferred upon the United States Supreme Court by 28 United States Code Sec. 1254 (1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS

Text of key cited provisions is contained in Appendix, post.

1) The Fourth Amendment to the United States Constitution;
2) The Fifth Amendment to the United States Constitution;
3) The Ninth Amendment to the United States Constitution;
4) The Fourteenth Amendment to the United States Constitution;
5) United States Code, Title 42, Section 1981;
6) United States Code, Title 42, Section 1983;
7) United States Code, Title 42, Section 1988;
8) Minnesota Constitution, Article 1, Section 13

G. STATEMENT OF THE CASE

1. The case herein originated 12/29/04 with the filing, by Plaintiffs, before the United States District Court for the State of Minnesota, of a *Complaint for Injunctive Relief, for Declaratory Relief, and for Damages* ("the Complaint"). The Complaint sought relief, partially on U.S. Constitutional grounds, from the "Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work" ("The Ordinance"), passed by the Beltrami, Minnesota County Board on August 17th, 2004.

The Complaint alleged, as causes of action,

1) Deprivation of Civil Rights under 42 USC § 1983, and the Fourth and Fourteenth Amendments to the U.S. Constitution;

2) Deprivation of Civil Rights under 42 USC § 1983, and the "takings" clause of the Fifth Amendment, and the Fourteenth Amendments to the U.S. Constitution;

3) Deprivation of Civil Rights under 42 USC § 1983, and the "takings" clause of the Fifth Amendment, and the Fourteenth Amendments to the U.S. Constitution;

4) Deprivation of Civil Rights under 42 USC § 1983, relating to invasion of privacy, and Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution;

5) That the vote to pass The Ordinance was unlawful, per Minnesota State law because one of the purported County Commissioners voting on same was not an inhabitant of Beltrami County at the time of the vote;

6) That The Ordinance is arbitrary and unreasonable;

7) That said County Board acted without authority in violation of the Ninth and Fourteenth Amendments to the United States Constitution;

8) That said County Board's action is preempted by Minnesota State law; and

9) Subterfuge - the County's passage of The Ordinance was to attain an impermissible purpose.

The Plaintiffs also filed, on 12/29/04, a *Motion for Temporary Restraining Order*, and a *Motion for Preliminary Injunction*; both to restrain and enjoin enforcement of The Ordinance. The affidavits filed by each Plaintiff with said motions stated that they would suffer irreparable damage were The Ordinance to be allowed to take effect on January 1st, 2005.

On 12/30/04, U.S. District Court Judge Joan N. Ericksen denied Plaintiffs' Motion for Temporary Restraining Order.

On 01/21/05, Plaintiffs filed a new Motion for Preliminary Injunction, which was heard by U.S. District Court Judge Joan N. Ericksen on 03/07/05, and denied.

At said hearing, March 7th, 2005, Plaintiffs Solberg, Ness, Steele, and Justin Chrz, CEO of and for Turtle Creek Saloon Inc., had driven the 225 miles to St. Paul to appear at the hearing, before Judge Ericksen, on the Motion for Preliminary Injunction. But Ericksen denied Solberg, Ness, and Chrz their "day in court" and would not hear from them on grounds

that 1) they had not filed a memorandum[1]; 2) Turtle Creek Saloon, Inc. was a corporation and could not be represented by Chrz; and 3) per Judge Ericksen, Ness and Solberg were "entities" because they owned, as their businesses, the sole proprietorships of Hillcrest Supper Club and The Other Place, respectively, and so, Ericksen ruled, could not appear pro se to argue the damage to their businesses caused by the subject smoking ordinance.

Judge Ericksen further refused to allow Plaintiff Adam Steele, who was permitted to argue his case, to call Solberg, Chrz, or Ness as witnesses.

Judge Ericksen thusly denied the Preliminary Injunction without the benefit of the argument or testimony of these damaged Plaintiffs (Solberg, Ness and Chrz) who were not allowed to speak at the hearing.

On 5/11/2005, Defendants moved for Summary Judgement, which was heard and granted by Judge Ericksen on 06/27/05.

With said grant of summary judgement Her Honour dismissed Plaintiffs' first, second, third, fourth and seventh causes of action with prejudice, and dismissed the fifth, sixth, eighth, and ninth causes as state claims on which the Court declined to exercise

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[1]This was done notwithstanding that all of the Plaintiffs had, on 12/29/04, jointly filed a Memorandum is Support of Motion for Temporary Restraining Order *and Motion for Preliminary Injunction*; and that on February 23, 2005, Plaintiffs STEELE, NESS, SOLBERG, and TURTLE CREEK SALOON, INC. filed a joint reply to Defendants' response, stating that they were, and at all times had been, in agreement with the Memorandum in Support of Preliminary Injunction filed by STEELE 01/21/05. Each of the Plaintiffs had also filed, on 01/21/05, their own Affidavits in Support of Preliminary Injunction.

supplemental jurisdiction; thusly dismissing and finally disposing of all of the claims of Plaintiffs.

On 07/23/05, Plaintiffs filed Notice of Appeal, appealing, to the United States Court of Appeals for the Eighth Circuit, the summary judgement and dismissals of 06/27/05.

On 06/07/2007 said Court of Appeals issued its opinion affirming the judgement of the District Court, followed by its mandate on 06/27/07.

2. The basis for jurisdiction of the Court having original jurisdiction (i.e. the United States District Court for the District of Minnesota) in this matter is United States Code, Title 28, Section 1331. Venue was proper under United States Code, Title 28, Section 1391 (b).

H. ARGUMENT

1. This case is unique in that, for the first time, it asks that the U.S. Supreme Court determine whether statutes and ordinances prohibiting smoking in private places are Constitutional.

2. Contrary to what the adverse parties have raised, this action does not purport to create any new rights. It does not, for instance, attempt to create any "right to smoke" not already enumerated by the United States Constitution. It is based wholly upon existing rights to

a) privacy within one's private business;

b) the right of the owner of that business, solely, to regulate what lawful conduct is permitted therein (that is, Plaintiffs accede that an owner could not permit an unlawful substance such as marijuana to be used; but maintain that he has a right, within privacy, to permit, if he chooses, any substance to be used which would not be otherwise unlawful to use in private, or outside, and would not be unlawful except for the nature of the owner's business and premises);

c) the right of said owner to, in effect, contract with his customer that in exchange for the customer's patronage and transaction, that said customer may use, occupy, and have quiet enjoyment of the owner's premises, including smoking thereon; and

d) the right of the owner to not have the goodwill and value of an existing business diminished or destroyed by regulation that drives its customers away, without just compensation first paid. (The Fifth Amendment to the U.S. Constitution requires just

compensation; Section 13 of Article 1 of the Minnesota Constitution requires that it be *first* paid or secured - i.e. *before* the property is taken.)

These rights should, and must, be upheld.

3. The "Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work" ("the ordinance") is, as a purported protection of public health and safety, unreasonable.

Firstly, there is no conclusive proof that "second-hand smoke" causes the mortality or disease as claimed by the ordinance. There is research that goes both ways. The very comprehensive Enstrom/ Kabat report which documents the cumulative effects (or lack of same) of exposure over a 39-year period, submitted by Plaintiffs (Exhibit B accompanying the Complaint - Case 0:04-cv-05109-JNE-RLE Document 11-2 Filed 12/29/2004) not only found that second-hand smoke did not cause certain diseases or mortality as stated in the ordinance, but also cited and defined the statistical errors in other studies which reported that it did.

Although the health effects of second-hand smoke remain a matter of public conjecture, they are not sufficiently shown as to warrant encroachment of fundamental Constitutional rights to keep people from being exposed to it.

Secondly, any exposure is voluntary. No one is forced to go into a smoking establishment. There are many establishments which, by policy of their owners, are non-smoking, so that a customer, concerned about exposure, need not do his business at a smoking establishment. Prior to the ordinance, many restaurants had both smoking and non-smoking

areas to suit the preferences of its clientele. A proprietor, left to his own devices, will normally tend to allocate space in proportion to that of his clientele which do, or don't smoke; that yields the best profit.

Normal market forces in a competitive free-enterprise system are a far better and more proper remedy to concerns about exposure to second-hand smoke than regulation which infringes Constitutional rights. If Constitutional rights are to be forsaken in order to protect people from the consequences of risky behaviour, skydiving should certainly be prohibited, as should non-marital physical romance; at least the jeopardy resultant of these activities is known, proven, and demonstrable; as concerns second-hand smoke, it is not.

Thirdly, even as concerns employees, working at a smoking establishment is a matter of choice. Many employees work there because they are active smokers and it is one of the few places where they can smoke on the job. Others assume the risks, if any, of the job much as if they worked at a sawmill, as a law enforcement officer, or on any other job which entails risk. In practice, again, a competitive free market generally ensures a choice, so that people who smoke can work at smoking establishments and those who object to smoke can work at non-smoking ones.

Fourthly, there is no law precluding a self-employed sole proprietor - an individual - from representing himself, and including his sole proprietor business interests, before the United States District Court. Legally, the individual and his sole proprietor business are one and the same.

Fifthly, at time of summary judgement, there

remained genuine issues of fact to be determined thought discovery and trial. One key issue is whether there exists enough incontrovertible, verified, and authenticatable evidence to render a prohibitive smoking ordinance a valid public purpose, and not an arbitrary exercise of authority. This issue would have been examined through discovery and at trial, but was not due to the issuance of summary judgement. The Defendants have claimed that evidence supports their actions, but the Plaintiffs have not been afforded the opportunity to examine, conduct investigation and discovery upon, or cross-examine that claimed evidence.

Sixthly, this matter is not rendered moot by the passage of the Minnesota "Freedom To Breathe Act of 2007" ("the State act"), which goes into effect October 1st, 2007, and purports to impose, statewide, restrictions similar to those of the ordinance.

Petitioners seek a final opinion from the United States Supreme Court on the Constitutionality of an ordinance which invades private places and prohibits tobacco smoking therein, and that opinion would also bear upon similar laws and ordinances which are being promulgated nationwide. A determination and published opinion by the U.S. Supreme Court on these matters is needed to provide legal, legislative, and public policy direction, and finally resolve the issue of whether these types of laws are within the bounds of the United States Constitution.

APPENDIX

I. OPINION OF THE UNITED STATES COURT OF APPEALS ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED:

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3154

Appeal from the United States District Court for the District of Minnesota.

[UNPUBLISHED]

Adam Steele; Donnis Solberg, doing business as The Other Place; Corner Bar of Bemidji. Inc., a Minnesota Corporation, doing business as Corner Bar; Turtle Creek Saloon, Inc., a Minnesota Corporation, doing business as Turtle Creek Saloon; James A. Ness, doing business as Hillcrest Supper Club,

Appellants,

v.

County of Beltrami, State of Minnesota; Keith Winger, Sheriff of the County of Beltrami, State of Minnesota; Other Unnamed Persons and Entities,

Appellees.

Submitted: February 15, 2007
Filed: June 7, 2007

Before LOKEN, Chief Judge, GRUENDER and BENTON, Circuit Judges.

PER CURIAM.

On August 17, 2004, the Beltrami County Board of Commissioners passed the "Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work" ("the ordinance"). In an effort to protect public health, the ordinance prohibits smoking in public places and places of work, subject to a few exceptions. The ordinance took effect on January 1, 2005, with further "phase-in" exceptions to the prohibition expiring on January 1, 2007.

On December 29, 2004, Adam Steele, an individual who smokes tobacco products, and several restaurants and bars ("plaintiffs") filed this 42 U.S.C. 1983 complaint against Beltrami County, its sheriff and other unidentified parties ("Beltrami") in an effort to enjoin the implementation of the ordinance. The plaintiffs were not represented by counsel. After the district court[1] had denied the plaintiffs' motion for a temporary restraining order and motion for a preliminary injunction, it granted Beltrami's motion for summary judgment, dismissing the plaintiffs' federal claims with prejudice and their state claims without prejudice. The plaintiffs appeal, and we affirm.

The plaintiffs appeal the district court's summary judgment in favor of Beltrami with respect to three of their federal claims, which allege that the ordinance violates their rights under the Fourth, Fifth,

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[1]The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Ninth and Fourteenth Amendments. "We review a grant of summary judgment de novo and will affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ruminer v. Gen. Motors Corp.*, 483 F.3d 561, 563 (8th Cir. 2007).

The plaintiffs' arguments are unpersuasive. In particular, they fail to provide any sound legal argument or authorities supporting their claimed constitutional rights to smoke or to control smoking on premises they have opened to the public, and we decline their invitation to create such rights. Our own research has revealed no relevant authority supporting these rights under any theory, and several state and municipal smoking regulations have survived similar challenges under the Fourth, Fifth and Fourteenth Amendments. See, e.g., *D.A.B.E. Inc. v. City of Toledo*, 393 F.3d 692, 696 (6th Cir. 2005) (holding that appellants failed to establish that an ordinance regulating smoking in restaurants and bars was a regulatory taking under the Fifth Amendment); *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 542-43 (10th Cir. 1987) (holding that a city regulation prohibiting certain fire department employees from smoking on or off duty was not irrational or arbitrary under the Fourteenth Amendment); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 540-43 (S.D.N.Y. 2005) (holding that state and municipal smoking bans did not violate a private social club's Fourth and Fourteenth Amendment rights). Indeed, *Gasper v. Louisiana Stadium and Exposition District* dealt with litigants urging the creation of a constitutional right to be free from tobacco smoke in state buildings and held that it is not a right recognized under the First,

Fifth, Ninth or Fourteenth Amendments. 418 F. Supp. 716, 718-22 (E. D. La. 1976), *aff'd*, 577 F.2d 897, 899 (5th Cir. 1978) ("[W]e can see no constitutional basis for injecting the courts and their injunctive powers into this tobacco-smoking controversy."). We agree with the district court in Gasper:

> [T]he United States Constitution does not provide Judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of and to engage in that type of adjustment of individual liberties *better left to the people acting through legislative processes.*

Id. at 722 (emphasis added). These same principles apply with equal force to the alleged right to smoke or to control smoking in a restaurant or bar. For these reasons and those set forth by the district court, we affirm. *See* 8th Cir. R. 47B[2].

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[2]We also note that the corporate plaintiffs did not challenge on appeal the dismissal of their claims for failure to prosecute. However, the sole proprietor plaintiffs did challenge the district court's alleged order requiring them to obtain counsel. Because their claims were not dismissed on this basis and in light of our decision on the merits of the claims, we do not reach this issue.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. **The Fourth Amendment to the United States Constitution:**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. **The Fifth Amendment to the United States Constitution:**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

C. **The Ninth Amendment to the United States Constitution:**

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

D. **The Fourteenth Amendment to the United States Constitution:**

Section 1.: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

....

Section 5.: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

E. Title 42, United States Code, Section 1981

"1981. Equal rights under the law

"(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) 'Make and enforce contracts' defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and

conditions of the contractual relationship.

"(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

F. Title 42, United States Code, Section 1983:

"1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

G. Title 42, United States Code, Section 1988:

"1988. Proceedings in vindication of civil rights

"(a) Applicability of statutory and common law

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the

provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

"(b) Attorney's fees

"In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

"(c) Expert fees

"In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert

fees as part of the attorney's fee."

H. **Minnesota Constitution, Article 1, Section 13:**

"Sec. 13. PRIVATE PROPERTY FOR PUBLIC USE. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

III. OTHER RELEVANT MATERIAL

a) THE SUBJECT ORDINANCE

Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work

Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work

The County Board of the County of Beltrami, Minnesota, ordains:

SECTION 1. PURPOSES AND FINDINGS OF FACT.

The Beltrami County Board finds that:

Tobacco smoke is a leading cause of disease in nonsmokers and a major source of indoor air pollution. Secondhand smoke causes heart disease, lung cancer, respiratory infections, decreased respiratory function and other health problems. Secondhand smoke kills an estimated 35,000 to 62,000 Americans each year from heart disease. Secondhand smoke also causes an estimated 3,000 lung cancer deaths in America each year.

These effects are well documented, and numerous medical and scientific authorities, including the American Medical Association, the Surgeon General, the National Institute on Occupational Safety and Health, the National Cancer Institute, the Environmental Protection

Agency, the National Academy of Sciences, the National Toxicology Program and the World Health Organization have recognized the deadly effects of exposure to secondhand smoke. The proposed Framework Convention on Tobacco Control, a global treaty negotiated by more than 190 countries, declares that "scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability."

There is no safe level of exposure to tobacco smoke. Science has been unable to find any level of dilution at which smoke does not cause cancer. Neither the separation of smokers and nonsmokers, nor the introduction of new ventilation systems, can eliminate the health hazards caused by secondhand smoke.

Employees in smoky workplaces are at special risk. One study has estimated that working in a smoky bar for eight hours is equivalent to smoking 16 cigarettes. Also at special risk are children, elderly people, and those with cardiovascular disease or impaired respiratory function, including people with asthma and those with obstructive airway disease.

Objective evidence does not bear out the fear that elimination of public smoking will harm a community's economy or result in a net loss of jobs in restaurants and bars. On the contrary, many independent economic studies have shown that the elimination of smoking has no material economic impact on a community. These studies are drawn from the experience of hundreds of communities that have successfully eliminated smoking in workplaces and public places. The states of California, Connecticut, Delaware, Maine, and New York have

adopted laws ending all smoking in bars, restaurants, and other public places, as have the nations of Ireland, New Zealand and Norway.

By reducing the exposure of young people to adult smoking and unhealthy role modeling, elimination of smoking in public places furthers Minnesota's goal of reducing youth smoking.

There is no legal or constitutional "right to smoke." Business owners have no legal or constitutional right to expose their employees and customers to toxic chemicals, whether in tobacco smoke or otherwise. On the contrary, employers have a common law duty to provide their workers with a workplace that is not unreasonably dangerous.

Accordingly, the Beltrami County Board finds and declares that the purpose of this ordinance is to:

(1) Protect the public health, welfare and safety by better ensuring the ability of citizens to breathe safe and uncontaminated air;

(2) Affirm that the right to breathe has priority over the desire to smoke; and

(3) Protect vulnerable populations, including employees, children, the elderly and those with chronic health conditions.

SECTION 2. DEFINITIONS.

As used in this ordinance:

(a) "Bar' means an establishment that has an on-sale license issued pursuant to Minnesota Statutes Chapter 340A, as amended from time to time, which does not serve food or which has a limited food menu selection as defined by Minnesota Statutes Section 157.16, subd. 3(d)(1), as amended from time to time.

(b) "Other person in charge" has the meaning

specified in the Minnesota Clean Indoor Air Act Rules, Minnesota Rules part 4620.0100, subpart 10, as amended from time to time.

(c) "Place of work" means any enclosed, indoor location at which two or more individuals perform any type of a service for consideration of payment under any type of employment relationship, including but not limited to an employment relationship with or for a private corporation, partnership, individual, or government agency. This term includes any location where two or more individuals gratuitously perform services for which individuals are ordinarily paid. Enclosed, indoor areas of private clubs, and rooms used for private meetings or social functions, are "places of work" if two or more persons acting under an employment relationship provide cleaning, catering, food or beverage service, maintenance or other support services in the location.

(d) "Proprietor" has the meaning specified by the Minnesota Clean Indoor Air Act Rules, Minnesota Rules, part 4620.0 100, subd. 13, as amended from time to time.

(e) "Public place" means any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to, restaurants and other facilities serving food or alcohol, retail stores, offices and other commercial establishments, public conveyances, educational facilities other than public schools, as defined in Minnesota Statutes § 120A.05, subdivisions 9, 11, and 13, hospitals, auditoriums, arenas, meeting rooms, and common areas of apartment buildings, condominiums or similar buildings.

(f) "Restaurant" has a meaning specified in Minnesota Statutes Section 157.15, Subd. 12, as amended from time to time.

(g) "Smoking" means the inhaling, exhaling or combustion of any cigar, cigarette, pipe, tobacco product, weed, plant or any other similar article. "Smoking" includes possessing or carrying a lighted cigar, cigarette, pipe or any other lighted smoking equipment. "Smoking" does not include the use of tobacco by enrolled members of a federally-recognized Indian tribe as part of a traditional Indian spiritual or cultural ceremony.

SECTION 3. PROHIBITIONS.

Subd. 1. Except as provided in subdivisions 3 and 4, smoking is prohibited in public places and places of work.

Subd. 2. To ensure that tobacco smoke does not enter public places or places of work, and that persons entering such places are not exposed involuntarily to tobacco smoke, smoking is prohibited within 10 feet of primary public entrances and exits, open windows and ventilation intakes of public places and places of work.

Subd. 3. The provisions of this section do not apply to:

(a) Private residences, including but not limited to homes, apartments, condominiums and town homes.

(b) Motor vehicles.

(c) Outdoor spaces, except as provided in subdivision 2.

Subd. 4. The provisions of this section do not apply to:

(a) Guest rooms in hotels and motels.

(b) Rented or leased cabins at resorts.

(c) Dormitory rooms.

This exception is temporary and expires on January 1st of 2007.

Subd. 5. The provisions of this section do not apply to Bars and Restaurants between the hours of 8:00 p.m. and 3:00 a.m. This exception is temporary and expires on January 1, 2007.

Subd. 6. The provisions of this section shall not apply to that portion of a bar or restaurant, provided that the following separations are maintained:

(a) The area is separated from the bar or restaurant on all sides by continuous floor-to-ceiling walls which are interrupted only by closeable doors, that are continuously closed, except when a person is actively entering or exiting the room, and

(b) The area has a ventilation system separated from the bar or restaurant, with the area maintaining a negative air pressure in relation to the adjacent bar or restaurant, and

(c) Minors are not permitted in the area at any time, and

(d) The area constitutes no more than 30 percent of the seating for the entire bar or restaurant.

Subd. 7. The provisions of this section shall not apply to residents of a board and care facility licensed by the State of Minnesota, unless smoking is otherwise prohibited by the owner or the operator of said facility.

SECTION 4. RESPONSIBILITIES OF PROPRIETORS.

The proprietor or other person in charge of a public place or place of work shall:

(a) Post "no smoking" signs that comply with the Minnesota Clean Indoor Air Act Rules, Minnesota

Rules, part 4620.0500, as amended from time to time. Where smoking is allowed in a portion of a bar or restaurant smoking room, the proprietor, or other person in charge, shall conspicuously post a sign at all entrances to that area of such business stating: "WARNING: This area contains tobacco smoke, which causes cancer, heart disease, lung disease, and can harm you, your unborn baby, and children."

(b) Ensure that ashtrays, lighters, and matchbooks are not provided in any area where smoking is prohibited; and

(c) Ask any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, ask the person to leave.

SECTION 5. ADDITIONAL PRIVATE PROHIBITIONS.

Nothing in this ordinance prevents the proprietor or other person in charge of any place, including, without limitation, any private residence, motor vehicle or outdoor space, from prohibiting smoking in any such place.

SECTION 6. RETALIATION PROHIBITED.

No person or employer shall discharge, refuse to hire, or in any manner retaliate against any employee, applicant for employment or customer because the employee, applicant or customer exercises any right to a smoke-free environment afforded by this ordinance or other law.

SECTION 7. EMPLOYEE'S RIGHTS PRESERVED.

An employee who consents to work in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

SECTION 8. OTHER APPLICABLE LAWS.

This ordinance is intended to complement and go beyond the Minnesota Clean Indoor Air Act, Minnesota Statutes §§ 144.411 to 144.417, as amended from time to time. Nothing in this ordinance authorizes smoking in any location where smoking is prohibited or restricted by other laws.

SECTION 9. VIOLATION AND PENALTIES.

Subd. 1. Smoking Where Prohibited. It is a violation of this ordinance for any person to smoke in an area where smoking is prohibited by this ordinance or by a private policy established by the proprietor or other person in charge of the area, as authorized by section 5.

Subd. 2. Proprietors. It is a violation of this ordinance for the proprietor or other person in charge of any premises subject to this ordinance to fail to comply with the requirements of section 4, or to retaliate against an employee, applicant for employment or customer, as prohibited by section 6.

Subd. 3. Penalties. A person who violates any provision of this ordinance shall be guilty of a petty misdemeanor. A person who violates any provision of this ordinance within one year after having been determined to have committed a previous violation shall be guilty of a misdemeanor. Each day of violation constitutes a separate offense.

Subd. 4. Enforcement. This ordinance shall be enforced by the Local City Police and County Sheriffs Department or other enforcement agencies designated by the county.

SECTION 10. SEVERABILITY.

If any portion of this ordinance, or its application to any circumstances, is held invalid, the remaining provisions shall be considered severable, and shall

be given effect to the maximum extent possible.

SECTION 11. REVIEW OF ORDINANCE. In the event that the Minnesota Legislature enacts a statute covering the subject matter of this Ordinance, the Beltrami County Board of Commissioners shall undertake a review of the provisions of this Ordinance. Such review shall be in the form determined by the Board of Commissioners, and shall be commenced within 60 days of the passage of such legislation.

SECTION 12. EFFECTIVE DATE.

This ordinance shall take effect on January 1, 2005.

SECTION 13. ADOPTION OF ORDINANCE

Passed by the County Board of Commissioners this 17th day of August, 2004.

b) SIGNATORIES

I join in the filing of this Petition for Writ of Certiorari, which is my Petition to the United States Supreme Court.

8/30/07

Signature — Date signed

Adam Steele

Print Name and title, if any

8/30/07

Signature — Date signed

James Ness

Print Name and title, if any

8/30/07

Signature — Date signed

Dennis Solberg

Print Name and title, if any

8/30/07.

Signature — Date signed

Frank Chez. Ground Manager

Print Name and title, if any

Signature — Date signed

Print Name and title, if any

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(2)

No. 07-334

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ADAM STEELE; DONNIS SOLBERG d/b/a THE OTHER PLACE; TURTLE CREEK SALOON, INC.; and JAMES NESS d/b/a HILLCREST SUPPER CLUB,

Petitioners,

v.

BELTRAMI COUNTY and SHERIFF KEITH WINGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

RATWIK, ROSZAK & MALONEY, P.A.

SCOTT T. ANDERSON
ERIC J. QUIRING
Counsel of Record
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioners' claims because there is no constitutional right to smoke at any time in any place?
2. Whether the Eighth Circuit correctly upheld the Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work as a reasonable protection of public health and safety?
3. Whether the dismissal of the claims of Petitioners Solberg and Ness were properly affirmed by the Eighth Circuit?
4. Whether Petitioners' claims have been rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Constitutional Provisions and Ordinances Involved	1
Statement of the Case and the Facts	1
Reasons for Denying the Petition	4
1. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE AT ANY TIME IN ANY PLACE	4
2. THE EIGHTH CIRCUIT'S DECISION CORRECTLY UPHELD BELTRAMI COUNTY'S ORDINANCE AS A REASONABLE PROTECTION OF PUBLIC HEALTH AND SAFETY	7
3. THE DISMISSAL OF THE CLAIMS OF PETITIONERS SOLBERG AND NESS WAS AFFIRMED BY THE EIGHTH CIRCUIT ON THE MERITS	9
4. PETITIONERS' CLAIMS HAVE BEEN RENDERED MOOT BY THE ENACTMENT OF THE MINNESOTA FREEDOM TO BREATHE ACT OF 2007	10
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES

Beatie v. City of New York, 123 F.3d 707 (2nd Cir. 1997) 7

City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995) 6

D.A.B.E. Inc. v. City of Toledo, 393 F.3d 692 (6th Cir. 2005) 5

Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987) 5

Jourdan v. Jabe, 951 F.2d 109 (6th Cir. 1991) 9

Loving v. Virginia, 388 U.S. 1 (1967) 5

N.W. Enterprises, Inc. v. City of Houston, 27 F.Supp.2d 754 (S.D. Tex. 1998) 8

Operation Badlaw, Inc. v. Licking General Health District Board of Health, et al., 866 F.Supp. 1059 (S.D. Ohio 1992) 6

Palko v. Connecticut, 302 U.S. 319 (1937) 6

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 6

Players, Inc. v. City of New York, 371 F.Supp.2d 522 (S.D.N.Y. 2005) 5

Preiser v. Newkirk, 422 U.S. 395 (1975) 11

Roe v. Wade, 410 U.S. 113 (1973) 5

Threesome Entertainment v. Strittmather, 4 F.Supp.2d 710 (N.D. Ohio 1998) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Minnesota Clean Indoor Act, Minn. Stat. §§ 144.411-17 ..... 8, 10, 11

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, United States Code Title 42, Sections 1981, 1983, and 1988, and the Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work. *See* Pet. at 8.[1]

STATEMENT OF THE CASE AND THE FACTS

After approximately a year and a half of study and debate, Beltrami County passed the Smoke-Free Ordinance for Indoor Public Places and Places of Work ("Ordinance") on August 17, 2004. Pets.' App., pp. 25-33. As clearly stated in the Ordinance, the County found that the detrimental health effects of tobacco smoke were well documented, citing a number of medical and scientific authorities. *Id.* The County further found that eliminating public smoking has no material economic impact on a community, as shown from studies conducted in states where smoking bans have been adopted. *Id.* The stated purpose of the Ordinance is to protect public health and welfare. *Id.*, pp. 25-27.

[1] Citations in the form "Pet." are to Petitioners' Petition. Citations in the form "Pets.' App." are to the Appendix to the Petition.

The Ordinance provides that "smoking is prohibited in public places and places of work." *Id.*, p. 29. "Public places" and "place of work" are defined phrases. *Id.*, p. 28. A public place is defined to include all restaurants and bars. *Id.* The Ordinance specifically excludes all private residences, motor vehicles and outdoor spaces. *Id.*, p. 29. The smoking prohibition for bars and restaurants was phased in over time. Instead of starting on January 1, 2005, which is the effective date of the Ordinance, for the most part, the smoking ban for bars and restaurants did not begin until two years later, on January 1, 2007. *Id.*, pp. 30, 33. Thus, during the peak customer hours of 8:00 p.m. until 3:00 a.m., bars and restaurants were able to continue to allow smoking for an additional two years. Furthermore, the Ordinance allowed bars and restaurants to have smoking areas as long as they were separate, enclosed and separately ventilated from the rest of the bar or restaurant. *Id.*, p. 30.

Adam Steele, Donnis Solberg d/b/a The Other Place, Turtle Creek Saloon, Inc., and James Ness d/b/a Hillcrest Supper Club (hereinafter collectively referred to as "Petitioners")[2] initiated this action against Beltrami County and Sheriff Keith Winger (hereinafter collectively referred to as "Respondents") alleging that their constitutional rights were violated by the enactment of the County's Ordinance. Specifically, Petitioners claimed violations of their constitutional

[2] Original Plaintiffs Corner Bar of Bemidji, Inc. and Tobacco Super Store, Inc. do not join in this Petition.

rights under the Fourth, Fifth, and Ninth Amendments to the United States Constitution.

Although the Ordinance was adopted on August 17, 2004, Petitioners initiated this action by seeking a temporary restraining order just days before the Ordinance took effect on January 1, 2005. When the temporary restraining order was denied by the United States District Court for the District of Minnesota, Petitioners sought a preliminary injunction, which was also denied at hearing on March 7, 2005. Respondents then moved the District Court for summary judgment, which was granted on counts 1-4 and 7 at hearing on June 27, 2005. The remaining state law claims were dismissed without prejudice. Petitioners then appealed to the Court of Appeals for the Eighth Circuit with respect to counts 1, 4, and 7. The Eighth Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents on June 7, 2007.

The record evidence shows that no material issues of fact exist, and that the District Court correctly granted summary judgment in favor of Respondents. The Petitioners' entire argument revolves around the misguided notion that the Constitution somehow guarantees the right to smoke in a bar or restaurant. The proposition that there is a constitutional right to smoke in public places is simply not supported in law and should not be adopted by this Court.

REASONS FOR DENYING THE PETITION

The Eighth Circuit's decision upholding the validity of Beltrami County's Smoke-Free Ordinance for Indoor Public Places and Places of Work does not conflict with a decision of this Court nor any Court of Appeals. To the contrary, the Eighth Circuit's decision is consistent with the decisions of all other courts that have addressed similar claims. There is simply no authority supporting Petitioners' claimed constitutional right to smoke or to control smoking on premises they have opened to the public. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. Moreover, Petitioners' claims are rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007, which took effect on October 1, 2007 and imposes statewide smoking restrictions similar to the restrictions of the Beltrami County Ordinance.

1. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE AT ANY TIME IN ANY PLACE.

Despite Petitioners' assertion that their claims are not an attempt to create any rights not already enumerated in the United States Constitution, accepting Petitioners' claims would require the Court to recognize a new constitutional right to smoke. Petitioners broadly allege that the Beltrami County Ordinance violates their constitutional right to privacy, as

guaranteed by the Fourth, Fifth, and Ninth Amendments. Specifically, Petitioners allege that their right to smoke, and to permit smoking, in any place at any time, stems from alleged existing rights to privacy within one's private business, the right of a business owner to regulate lawful conduct, the right of a business owner to contract with customers, and the right of a business owner to not have goodwill diminished by government regulation. Pet., at 13. Because Petitioners can point to no law supporting such assertions, the District Court and Eighth Circuit properly found that the Respondents were entitled to judgment as a matter of law.

The Eighth Circuit held that Petitioners failed to provide any sound legal argument or authorities supporting their claimed constitutional rights to smoke or to control smoking on premises they have opened to the public. *See* Pets.' App., p. 19. In fact, several state and municipal smoking regulations have survived similar challenges. *See, e.g., D.A.B.E. Inc. v. City of Toledo*, 393 F.3d 692, 696 (6th Cir. 2005); *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 542-43 (10th Cir. 1987); *Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 540-43 (S.D.N.Y. 2005).

Petitioners have provided no legal support for their contention that smoking should be recognized as one of the limited situations invoking a constitutional right to privacy. *See Roe v. Wade*, 410 U.S. 113 (1973) *rehearing denied* on February 26, 1973 (recognizing a privacy right regarding making a decision to terminate a pregnancy), *Loving v. Virginia*, 388 U.S. 1, 12

(1967) (recognizing a privacy right regarding marriage), *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (recognizing a privacy right in child rearing and education.) Only personal rights that are determined to be "fundamental" or "implicit in the concept of ordered liberty" are protected under the penumbra of constitutional privacy rights. *Palko v. Connecticut*, 302 U.S. 319 (1937).

Contrary to Petitioners' assertions, smoking in a public place is not a fundamental right that would give rise to a constitutional privacy interest. *City of North Miami v. Kurtz,* 653 So.2d 1025, 1028 (Fla. 1995) (finding that the penumbra of fundamental privacy rights does not include the "right to smoke"), *Operation Badlaw, Inc. v. Licking General Health District Board of Health, et al.,* 866 F.Supp. 1059, 1064 (S.D. Ohio 1992). The fact that the ability to smoke or to permit smoking is not constitutionally protected is exemplified by the heavy regulation of tobacco products. These regulations reflect the collective conscience of the citizens of the United States that there is no fundamental right to smoke or to permit smoking at any place and any time.

For all of the reasons discussed above, the Eighth Circuit's decision upholding the Ordinance was entirely consistent with the decisions of all other courts that have addressed similar claims, and thus, this Court should deny the petition for writ of certiorari.

2. THE EIGHTH CIRCUIT'S DECISION CORRECTLY UPHELD BELTRAMI COUNTY'S ORDINANCE AS A REASONABLE PROTECTION OF PUBLIC HEALTH AND SAFETY.

Petitioners claim that the County's Ordinance is unreasonable because there is no conclusive proof that second-hand smoke is dangerous, exposure to smoke is voluntary for customers and employees, and the regulation of smoking is not a valid public purpose. Such arguments are without merit and do not warrant this Court's review. As determined by the District Court and Eighth Circuit, the Ordinance represents a valid exercise of County authority.

The Beltrami County Board has the authority to act in furtherance of the public health and welfare. In enacting the Ordinance at issue here, the County clearly expressed a public interest in prohibiting smoking in public places. In the preamble to its Ordinance, Beltrami County asserted an important interest in safeguarding the health of its citizens and patrons of establishments located in the County from the ill and serious effects of second hand smoke. Despite Petitioners' opinions to the contrary, these risks are well-documented and commonly recognized. *See Beatie v. City of New York*, 123 F.3d 707, 709-10 (2nd Cir. 1997) (chronicling the dangers of second hand smoke). The public interest in avoiding the significant health threats posed by involuntary second hand smoke is substantial and indisputable.

Petitioners ignore the great weight of scientific evidence that second hand smoke is dangerous, and instead, rely exclusively on the Enstrom/Kabat Report for their position that the health effects of second-hand smoke are merely public conjecture. However, the County has the authority to weigh the credibility of competing information in determining the merits of legislating in the public interest. *See N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998) *reversed in part on other grounds*. The judiciary is "not a super-legislature wherein judges sit to 'apprise the wisdom' of a municipality's discretion." *Threesome Entertainment v. Strittmather*, 4 F.Supp.2d 710, 719 (N.D. Ohio 1998) (citations omitted). A municipality's choice of whether it should rely upon one report over another is fully within its legislative discretion and courts need only conclude that a reasonable legislature would have enacted the challenged ordinance. *Id.* (citations omitted).

Furthermore, people who choose to smoke may still do so in their private residences, motor vehicles or in certain outdoor spaces. They are only prohibited from smoking in public places where their personal habit infringes and affects the general health and welfare of other citizens. The same public interest in prohibiting smoking in public places has been duly recognized and declared by the Minnesota legislature through the Minnesota Clean Indoor Air Act and the recent enactment of the Freedom to Breathe Act of 2007. Minn. Stat. §§ 144.411-17. The County clearly has a significant interest in the health and safety of

its residents. In order to promote those interests, the County must be able to promulgate reasonable regulations such as the Ordinance at issue here.

The District Court and Eighth Circuit appropriately upheld the Ordinance as a valid exercise of the County's authority. Petitioners have provided no reason to overturn those decisions, and thus, this Court should deny the Petition.

3. THE DISMISSAL OF THE CLAIMS OF PETITIONERS SOLBERG AND NESS WAS AFFIRMED BY THE EIGHTH CIRCUIT ON THE MERITS.

Petitioners Solberg and Ness claim that the District Court erred in dismissing their claims for failure to prosecute. The District Court granted summary judgment against Petitioners Solberg and Ness for failing to appear at hearing to oppose summary judgment. Because the Eighth Circuit affirmed the dismissal of the Petitioners' claims on the merits, it did not reach this issue. Accordingly, the claims of Petitioners Solberg and Ness regarding the dismissal of their claims for failure to prosecute need not be reviewed by this Court.

By not appearing at the summary judgment hearing, Petitioners Solberg and Ness failed to prosecute their claims. They are entitled to no special considerations because they appeared pro se. *See Jourdan v. Jabe*, 951 F.2d 109 (6th Cir. 1991) (prisoner suing pro se was not entitled to any special consideration in

determining whether to dismiss his complaint for failure to prosecute). Despite the District Court's dismissal of the claims of Petitioners Solberg and Ness for failure to prosecute, the Eighth Circuit addressed (and affirmed the dismissal of) their claims on the merits. As a result, it would be improper for this Court to review the claims raised by Petitioners Solberg and Ness regarding failure to prosecute.

4. PETITIONERS' CLAIMS HAVE BEEN RENDERED MOOT BY THE ENACTMENT OF THE MINNESOTA FREEDOM TO BREATHE ACT OF 2007.

During its 2007 Regular Session, the Minnesota legislature adopted the Freedom to Breathe Act of 2007, which amended the Minnesota Clean Indoor Air Act by eliminating smoking in all public places, places of employment, public transportation, and at public meetings. Minn. Stat. § 144.411-17. The amendments took effect on October 1, 2007. The Freedom to Breathe Act of 2007 imposes statewide restrictions on smoking similar to those imposed by the Beltrami County Ordinance. Even if Petitioners could prevail on their alleged claims against the County, Minnesota law would still prohibit smoking in public places. As a result, the Petition should be denied as moot.

The Freedom to Breathe Act prohibits smoking in all public places, which are defined as "any enclosed, indoor area used by the general public, including, but

not limited to, restaurants; bars; any other food or liquor establishment; retail stores and other commercial establishments; educational facilities other than public schools . . . ; hospitals; nursing homes; auditoriums; arenas; meeting rooms; and common areas of rental apartment buildings." Minn. Stat. § 144.412, subd. 2. "Places of employment" are defined by the Act as "any indoor area at which two or more individuals perform any type of a service for consideration of payment under any type of contractual relationship" or where two or more individuals gratuitously perform services for which individuals are ordinarily paid. *Id.*, subd. 1b. The Act clearly imposes the same smoking prohibition on the same types of places as the Beltrami County Ordinance, including the businesses owned by Petitioners.

Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Following the enactment of the state-wide smoking ban, there is no actual controversy between the Petitioners and Respondents. Even if Petitioners were to prevail on their alleged claims, the Court would be unable to effectively order the requested relief because the Minnesota Freedom to Breathe Act of 2007 prohibits Petitioners from smoking, or allowing smoking, in public places and places of employment.

Despite Petitioners erroneous conclusory assertion that this matter is not rendered moot by the Minnesota Freedom to Breathe Act of 2007, there is

no reason for this Court to waste limited judicial resources on a case challenging a county ordinance where the state has acted to impose the same regulation. As stated above, Petitioners have failed to demonstrate any legal support for a reversal of the Eighth Circuit's decision. However, even if they had, the Petition should be denied because this matter has been rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

RATWIK, ROSZAK & MALONEY, P.A.

SCOTT T. ANDERSON
ERIC J. QUIRING
Counsel of Record
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondents County of Beltrami and Sheriff Keith Winger

Dated: October 12, 2007